

## Notice of Decision and Reasons for Decision

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Applicant:	AC8
Agency:	Department of Health and Human Services
Decision Date:	9 May 2019
Exemptions considered:	Sections 25A(5), 38
Citation:	<i>AC8 and Department of Health and Human Services (Freedom of Information) [2019] VICmr 26 (9 May 2019)</i>

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FREEDOM OF INFORMATION – Child Protection files – statements made to a protective intervener

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse access to the documents.

My reasons for decision follow.

**Joanne Kummrow**  
Acting Public Access Deputy Commissioner  
9 May 2019

## Reasons for Decision

### Background to review

1. The Applicant made the following request to the Agency:

I seek access to the following documents held on my children's child protection files:

- Any notes on discussions or interviews with my children from [specified date];
- The most recent intake and closure summaries.

2. The Agency denied the Applicant's request in full based on its application of section 25A(5).

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 17 April 2019, the Applicant indicated [they] only seek records relating to interviews of [the Applicant's] children. Accordingly, my review is limited to that class of information in the documents.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the Applicant's FOI request;
  - (a) information provided with the Applicant's review application;
  - (b) the Agency's submission dated 15 April 2019; and
  - (c) communications between OVIC staff, the Agency and the Applicant.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### Child Protection and Child Protection records

8. Firstly, I wish to discuss Child Protection and the general nature of Child Protection records in Victoria.
9. The Agency is responsible for enforcing and administering the law relating to Child Protection in Victoria under the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**).
10. Child Protection files come into existence when the Agency is notified or otherwise becomes aware that a child is at risk to harm, wellbeing or other safety concerns. The CYF Act provides for voluntary reports from a person and mandatory reporting by persons in certain professions specified under the Act.

11. The main functions of Child Protection are to:
  - (a) investigate matters where it is alleged a child is at risk of harm;
  - (b) refer children and family appropriately to services in providing ongoing safety and wellbeing of children;
  - (c) escalate matters to the Children's Court if a child's safety cannot be ensured within the family; and
  - (d) supervise children on legal orders granted by the Children's Court.
12. The Agency has published a 'Child Protection Manual', which is used by Child Protection practitioners and contains information for families. The manual is available at [www.cpmanual.vic.gov.au](http://www.cpmanual.vic.gov.au).
13. The role and mandate of Child Protection is obviously an important and significant one. It is also comprehensively regulated under the CYF Act.
14. Parliament has determined strict parameters apply to what information can be released in relation to Child Protection matters, including a prohibition on identifying a person who notified the Agency about any child protection concerns (**notifiers**) and any subsequent Agency investigations into or action taken to address any concerns.
15. By way of example, the CYF Act prohibits disclosure of the names of notifiers, as well as any information likely to lead to the identification of a notifier, except in certain limited circumstances where disclosure is authorised. This reflects the strong need for confidentiality around Child Protection notifications and any subsequent inquiries or investigations conducted by the Agency in order to assure notifiers of confidentiality when making sensitive notifications to the Agency in the interests of protecting children from harm or possible harm.
16. This means that when a person who has been involved with Child Protection, or the parent or guardian of such a child, seeks access to a Child Protection file, the confidentiality provisions that apply to Child Protection information under the CYF Act are strictly applied.

### **Review of exemptions**

17. The Agency claim it is clear from the terms of the Applicant's FOI request any documents that contain information relevant to the request, should they exist, would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to the documents under section 25A(5) in accordance with the Applicant's FOI request. The Agency's decision letter sets out the reasons for its decision.
18. The Agency did not provide a copy of the documents falling within the scope of the Applicant's request as, due to its reliance on section 25A(5), the Agency is not required to undertake a search for or to identify any documents relevant to the FOI request.

### **Section 25A(5)**

19. In *Knight v Corrections Victoria*,<sup>1</sup> Justice Bell identified that section 25A(5) would apply to an FOI request if the following three prerequisites were met:
- (a) based solely on the description in the request, the decision-maker must work out the inherent or essential quality or character of the documents requested;
  - (b) the decision-maker must determine whether the documents, as described by the Applicant, are exempt. It must be apparent that all of the documents are exempt; and
  - (c) from the face of the request or the Applicant's declared wishes, there must be no scope to provide edited copies of any of the documents.

*What is the essential character of the documents requested?*

20. It is apparent the essential quality or character of the documents, as described in the Applicant's FOI request, should they exist, would relate to interviews conducted by the Agency with children in the course of a Child Protection investigation.

*Would all the documents requested, as described by the Applicant, be exempt?*

21. In relying on section 25A(5), the Agency claims any documents, should they exist, would be exempt under sections 31(1)(a), 33(1), 35(1)(b) and 38.

### **Section 38**

22. A document is exempt under section 38 if:
- (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information contained in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
23. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

*Application of the secrecy provision*

24. The Agency applied section 38 in conjunction with sections 191 and 209 of the CYF Act. In its submission, it also claimed section 41 of the CYF Act.
25. Section 41 of the CYF Act provides:

#### **41 Identity of reporter or referrer confidential**

- (1) If a report is made to the Secretary under section 28 or 29, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service to which the matter is referred under section 30—
- (a) the name of the person who made the report; and

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<sup>1</sup> [2010] VSC 338.

- (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 60 penalty units.

- (1A) If a referral is made to a community-based child and family service under section 31 or 32, a person (other than the person who made it) must not disclose to any person other than the Secretary or that community-based child and family service—

- (a) the name of the person who made the referral; and
- (b) any information that is likely to lead to the identification of the person who made the referral.

Penalty: 60 penalty units.

- (2) Subsection (1) does not apply if the person who made the report or referral—

- (a) gives written consent to the Secretary; or
- (b) gives written or oral consent to the community-based child and family service.

26. Section 191 of the CYF Act provides:

**191 Confidentiality**

- (1) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection (4)—

- (a) the name of the person who made the report; or
- (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.

- (3) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a police officer who made a report under section 185.

- (4) If a report is made to the Secretary under section 183 or 184, the information referred to in subsection (1) may be disclosed to a community-based child and family service if—

- (a) the Secretary has made a determination under section 187(1)(c) in respect of the report; and
- (b) the matter is referred to the community based child and family service under section 30.

- (5) A community-based child and family service to which information referred to in subsection (1) is disclosed must not disclose that information to any other person except in accordance with this Part.

Penalty: 60 penalty units.

27. Section 209 of the CYF Act provides:

**209 Confidentiality**

- (1) A protective intervener must not disclose to any person, other than to another protective intervener or to a person in connection with a court proceeding or to a person in connection with a review by VCAT—
- (a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a protective intervention report; or
  - (b) any information that is likely to lead to the identification of a person referred to in paragraph (a)— without the written consent of the person referred to in paragraph (a) or authorisation by the Secretary.

Penalty: 10 penalty units.

- (2) The Secretary may only authorise the disclosure of information to a person under subsection (1) if the Secretary believes on reasonable grounds that the disclosure is necessary to ensure the safety and wellbeing of the child.
- (3) In this section ***court proceeding*** includes a proceeding in the Family Court of Australia.

28. In summary, sections 41, 191 and 209 of the CYF Act prohibit the disclosure of the names of persons, as well as any information likely to lead to the identification of any person who:

- (a) provided confidential child protection information to the Agency in the course of a protective intervention investigation; or
- (b) notified the Agency of their concerns for the wellbeing of a child.

29. Unauthorised disclosure of such information is an offence and carries penalties under the CYF Act.

30. I am satisfied sections 41, 191 and 209 of the CYF Act are secrecy provisions to which section 38 of the FOI Act applies, for the following reasons:

- (a) The CYF Act is an enactment in force for the purposes of section 38 of the FOI Act.
- (b) I am satisfied the documents, as sought under [the Applicant's] narrowed FOI request, should they exist, would contain the specific information described in sections 41, 191 and 209 of the CYF Act.
- (c) I am satisfied Agency officers are prohibited from disclosing information of the kind described in sections 41, 191 and 209 of the CYF Act.

31. I am satisfied none of the exceptions in sections 41(2)(a), 191(1) and 209(1) of the CYF Act apply such that section 38 of the FOI Act cannot be relied upon. This is because the Applicant has not provided the consent of relevant individuals who [the Applicant] considers provided confidential information to the Agency. While the Applicant considers [their] children were interviewed by the Agency, as minors, they lack capacity to provide consent. Further, in the circumstances, I do not consider the exception under the above confidentiality provisions can be relied upon where a parent, who is also an FOI applicant, seeks to access information under the FOI Act and provides consent as a parent on behalf of a child who may have been interviewed as part of a Child Protection investigation.

32. Accordingly, I am satisfied section 38, in conjunction with the confidentiality provisions under the CYF Act, operates to exempt the documents sought by the Applicant, should they exist.
33. In light of the above, there is no need for me to consider the other exemptions applied by the Agency.

***Is there scope to provide edited copies of the documents requested?***

34. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency or Minister to delete that information, and if the applicant is agreeable to receiving such a copy.
35. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions, and the effectiveness of the deletions – that is, whether editing the document would render it meaningless.<sup>2</sup>
36. I have considered the effect of deleting exempt information from the documents – such as the names of the relevant individuals. However, I consider the remaining information such as dates on which reports were made as well as the substance of the reports could lead to the identification of the relevant persons who made the notifications or provided confidential information to the Agency. In my view, it is not practicable for the Agency to delete the exempt information, because doing so would render the documents meaningless.
37. Accordingly, in my view, there is no scope for the Agency to provide edited copies of the documents requested by the Applicant.

***Conclusion***

38. On the information available, I am satisfied the three elements of section 25A(5) are met, and the Applicant’s request is to be refused in accordance with that section.

***Review rights***

39. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>3</sup>
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>4</sup>
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>5</sup>
42. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
43. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>6</sup>

***When this decision takes effect***

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<sup>2</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26].

<sup>3</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>4</sup> Section 52(5).

<sup>5</sup> Section 52(9).

<sup>6</sup> Sections 50(3F) and (3FA).

44. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded